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IN THE

Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.,

Petitioners,

v.

KAREN PACHECO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law severely restricting the use of arbitration in agreements between patients and health care providers, and which concededly would be preempted under the Federal Arbitration Act, 9 U.S.C. § 2, is saved from preemption because it is "for the purpose of regulating the business of insurance" under section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6 of the Rule of this Court, petitioners state that petitioner Colorado Permanente Medical Group, P.C., is a Colorado Corporation that does not have a parent or any publicly held corporation that owns 10% or more of its stock.

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OPINIONS BELOW

The order of the trial court granting petitioners' motion to compel arbitration is unpublished, and is reproduced in the appendix (Pet. App.) at 45a-48a. The order of the trial court denying respondent's motion to vacate the arbitration award is unpublished, and is reproduced at Pet. App. 34a. The opinion of the Colorado Court of Appeals is reported at 55 P.3d 141 (Colo. App. 2001) and is reprinted as reported at Pet. App. 29a-33a. The opinion of the Colorado Supreme Court is reported at 71 P.3d 375 (Colo. 2003), and is reprinted as reported at Pet. App. 1a-28a. The order of the Colorado Supreme Court denying rehearing is unpublished, and is reproduced at Pet. App. 49a.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on June 9, 2003. An order denying rehearing was entered on June 30, 2003. On September 16, 2003, Justice Breyer extended the time for filing the petition to and including October 28, 2003. This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

The statutory provisions involved are section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012, section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, and section 13-64-403 of the Colorado Health Care Availability Act ("HCAA"), Colo. Rev. Stat. § 13-64-403. Each is set forth in the appendix at Pet. App. 50a-55a.

STATEMENT OF THE CASE

This petition raises an unresolved and recurring issue of national importance regarding the applicable principles for

determining when a state law and, in particular, a law restricting arbitration, is saved from federal preemption under the first clause of section 2(b) of the McCarran-Ferguson Act.

Statutory Background

1. Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in 1925 to reverse the trend of judicial and state hostility toward arbitration agreements and to establish a broad federal policy favoring the use of arbitration to resolve legal disputes. See generally *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Of particular relevance to this case is section 2 of the FAA, which states that written agreements to submit disputes to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 thus preempts state laws that impose requirements on arbitration agreements that are not also imposed on contracts generally. *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996).

2. Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1012 (see Pet. App. 50a-51a), in 1945 in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In *South-Eastern*, this Court held that the insurance industry was subject to Congress's power to regulate under the Commerce Clause. U.S. Const. art. I, § 8. By passing the McCarran-Ferguson Act, Congress preserved the states' preeminent authority by exempting the business of insurance from regulation pursuant to federal laws of general applicability. See generally *SEC* v. *National Sec., Inc.*, 393 U.S. 453 (1969). The first clause of section 2(b) of the McCarran-Ferguson Act applies to federal laws that are not specifically directed to the business of insurance, and bars preemption by such laws when preemption would "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). The second

clause of the McCarran-Ferguson Act applies to the federal antitrust laws, and specifies that those laws are "applicable to the business of insurance to the extent that such business is not regulated by State law." *Id.*

3. Colorado enacted the Colorado Health Care Availability Act ("HCAA"), Colo. Rev. Stat. § 13-64-403 (see Pet. App. 51a-55a), in 1988 as a tort reform measure aimed at medical malpractice cases. The section of the HCAA at issue in this case, section 13-64-403, is included in Part 4 of the HCAA, entitled "Procedures and Evidence in Medical Malpractice Actions." The Colorado Legislature's stated "intent" in passing section 13-64-403 is to ensure "that an arbitration agreement be a voluntary agreement between a patient and a health care provider and no medical malpractice insurer shall require a health care provider to utilize arbitration agreements as a condition of providing medical malpractice insurance to such health care provider." See *id.* § 13-64-403(1). The remaining eleven subsections of section 13-64-403 each impose or define conditions that affect the enforceability of arbitration agreements between patients and "health care providers." "Health care providers" are defined (in subsection 12) to include persons (including corporations) licensed to deliver health care and facilities that deliver health care. *Id.* § 13-64-403(12).

Subsections 3 and 4 are also directly relevant here. These specify in detail, *inter alia*, the font-size, typeface, position within the contract, and language that an arbitration agreement between a patient and a health care provider must contain in order to be enforceable. *Id.* § 13-64-403(3), (4). It is undisputed that the arbitration agreement at issue here did not meet these requirements, and that the FAA, if applicable, prohibits their enforcement.

Proceedings Below

1. Respondent Karen Pacheco brought this wrongful death action against her deceased husband's health care

providers, including petitioners Dr. Michael Miller, Dr. Timothy Collins, Dr. Lawrence Allen and the Colorado Permanente Medical Group ("CPMG"), which was the physicians' employer. She alleged that petitioners were negligent in diagnosing and treating her husband, Mark Pacheco. Mr. Pacheco received medical services from CPMG through his health care coverage with Kaiser Foundation Health Plan of Colorado ("Health Plan").[1] Health Plan contracted with CPMG to provide medical services to Health Plans' enrollees.

Mr. Pacheco's "Group Medical And Hospital Service Agreement" with Health Plan provides for binding arbitration of medical malpractice claims. In response to Ms. Pacheco's action, petitioners moved to compel arbitration in accordance with that agreement. Ms. Pacheco objected, arguing that the arbitration clause was unenforceable because it violated the HCAA's formatting and language requirements. In response to petitioners' claim that the FAA preempted these requirements, Ms. Pacheco maintained that they were saved from preemption because they were enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

2. The trial court granted the motion to compel arbitration. The court observed that the arbitration provision in Mr. Pacheco's agreement did not comply with the arbitration-specific requirements of the HCAA, but held that the agreement was nonetheless enforceable because the FAA preempts those restrictions. Pet. App. 46a-47a (citing *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996)). In reaching that conclusion, the trial court rejected Ms.

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[1] Health Plan is a Colorado nonprofit corporation, which operates principally as a group practice prepaid health plan. It is licensed by the Colorado Division of Insurance as a health maintenance organization under the Colorado Health Care Coverage Act.

Pacheco's argument that the McCarran-Ferguson Act saved the HCAA requirements from FAA preemption. *Id.* at 47a.

The trial court looked to the three-factor test set forth in *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 129 (1982), to determine whether conduct that is regulated by state law constitutes the business of insurance under McCarran-Ferguson. In *Pireno*, this Court considered whether the conduct at issue: (1) has the effect of transferring or spreading a policyholder's risk; (2) is an integral part of the relationship between the policy holder and the insured; and (3) is limited to entities within the insurance industry. *Id.* at 129. Without commenting on the first and second factors, the trial court held that the HCAA "manifestly does not meet the third part of the test because the practice regulated by the statute is not limited to entities within the insurance industry; rather the statute applies to 'health care providers.'" Pet. App. 47a; see *id.* (stating that the HCAA is a "tort reform statute" that "generally applies to 'health care providers,' not to insurance companies"). The trial court concluded that "Kaiser may be an insurer as well as a health care provider, but the statute applies to all health care providers, not just health maintenance organizations; thus the statute does not regulate the business of insurance." *Id.*

3. The matter proceeded to arbitration, and the arbitrator ruled in favor of petitioners. Pet. App. 35a-44a. Ms. Pacheco moved to vacate the decision; the trial court denied the motion; and Ms. Pacheco appealed. *Id.* at 34a. The Colorado Court of Appeals reversed, holding that the arbitration agreement was unenforceable against Ms. Pacheco because only her husband was a party to the arbitration agreement. *Id.* at 29a-33a. Petitioners then sought review in the Colorado Supreme Court.

4. Having already noted the "importan[ce]" of deciding whether the HCAA's arbitration-specific requirements were preempted by the FAA in an earlier decision where it could not reach that issue, see *Colorado Permanente Med. Group,*

P.C. v. *Evans*, 926 P.2d 1218, 1229 (Colo. 1996), the Colorado Supreme Court granted review. The supreme court rejected the court of appeals' conclusion that the agreement does not apply to Ms. Pacheco, and then turned to the preemption issues. Pet. App. 11a.

The Colorado Supreme Court first held that the HCAA's arbitration restrictions "clearly conflict" with the FAA. Pet. App. 12a. Unless the HCAA were otherwise saved from preemption, the FAA would bar its enforcement in this case. *Id.* at 12a-13a (citing this Court's decision in *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996)).

The Colorado Supreme Court then addressed the "critical issue" of "whether the McCarran-Ferguson Act 'reverse-preempts' the FAA preemption of the HCAA arbitration regulations." Pet. App. 13a. That issue, in turn, required the court to determine whether the HCAA was enacted "'for the purpose of regulating the business of insurance.'" *Id.* (citing 15 U.S.C. § 1012(b)).

For guidance, the Colorado Supreme Court looked to this Court's decisions in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969) and *United States Department of Treasury* v. *Fabe*, 508 U.S. 491 (1993). Building on language from the opinions in those cases, the court below concluded that state statutes may be deemed to be "for the purpose of regulating the business of insurance" if they "directly regulate contracts between insurance policyholders and their insurers," and if they "'further the interests of these policyholders.'" Pet. App. 15a-16a. Applying this test, the court held that the HCAA directly "regulat[es] health insurance contracts drafted by the health care provider," that "HMOs simultaneously function as health care providers and health care insurers," and that by imposing typeface, language, and other requirements, the HCAA "protect[s] patients who are insured by that provider." *Id.* at 16a & n.9.

The court expressly declined to consider the *Pireno* factors that had guided the trial court. Pet. App. 14a n.8. Relying on this Court's decisions in *Fabe* and *Kentucky Ass'n of Health Plans, Inc.* v. *Miller*, 538 U.S. ___, 123 S. Ct. 1471 (2003), the majority below stated that the *Pireno* factors arose in the antitrust context governed by the "*second clause* of section 1012(b)," and thus "do not apply directly to the broader issue, under the *first clause* of section 1012(b), of whether a state law has been enacted for the 'purpose of regulating the business of insurance.'" Pet. App. 14a n.8.

The Colorado Supreme Court also rejected petitioners' argument that the HCAA was similar to arbitration-restriction statutes of general applicability, which other courts have declined to preserve under the McCarran-Ferguson Act. Pet. App. 12a. The court distinguished those cases, stating that "[t]he Colorado HCAA is not a statute of general applicability because it targets only arbitration agreements contained in medical services contracts." *Id.* The court did not explain why the HCAA's limited applicability to "medical services contracts" was sufficient to distinguish it from a statute of general applicability for purposes of McCarran-Ferguson. Instead, the court merely opined that "[a]s long as the statute is not one of general applicability, it is not necessary that the state statute relate only to insurance or that the statute be in the form of an insurance code." *Id.* at 17a.

Justice Kourlis, joined by Justice Bender, dissented. The dissenting justices agreed with the majority that under *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996), the FAA would preempt the HCAA. Pet App. 21a-22a. The dissent disagreed, however, with the majority's conclusion that the HCAA should be saved as a law for the purpose of regulating the business of insurance. *Id.* at 22a-28a.

In determining the purpose of the HCAA, the dissent (like the trial court) first considered the *Pireno* factors. Pet. App. 24a-26a. The dissent observed that "to the extent" *Pireno* applies, the "HCAA provisions at issue are not 'integral to the

policy relationship between' the medical service provider and its insurer, nor do they regulate, constrain, set benefits, exclusions or limitations that [a]ffect the relationship between the insurer and the policyholders." *Id.* at 26a.

Apart from *Pireno*, the dissent noted that several other courts had held that the McCarran-Ferguson Act does not save statutes of general application that restricted arbitration from preemption. Pet. App. 26a-27a. The dissent reasoned that the same result is appropriate for the HCAA. *Id.* at 27a. Like the statutes in those other cases, the HCAA does not apply "specifically to the relationship between insurers and their insureds," and therefore should be treated as a "law of general application, and thus not subject to the McCarran-Ferguson savings clause." *Id.*

Finally, the dissent observed that the majority's "interpretation" of section 2(b) as covering any law that "furthers the interests of policyholders" was too "broad." Pet. App. 28a. It would effectively encompass any state law that affects the size of "insurance premiums," for example, such as laws affecting the use of "seat belts" or "helmets," that have no meaningful connection to the business of insurance. *Id.*

The petitioners sought rehearing, which the Court denied en banc on June 30, 2003. Pet. App. 49a. Justices Kourlis and Bender voted to grant the petition for rehearing. *Id.*

REASONS FOR GRANTING THE PETITION

At the heart of this case is a very real, but unwarranted, collision between two important federal statutes: the FAA, which favors arbitration, and the McCarran-Ferguson Act, which favors state regulation of insurance matters. The FAA embodies Congress's intent to ensure that arbitration is available free from legal restraints that manifest the age-old judicial and state hostility to arbitration. See, *e.g.*, *Gilmer*, 500 U.S. at 24-25; *Dean Witter Reynolds Inc.* v. *Byrd*, 470

U.S. 213, 219-20 (1985). This Court has thus repeatedly held that the FAA preempts state laws that uniquely restrict the enforcement of agreements to arbitrate. *E.g.*, *Doctor's Assocs.*, 517 U.S. at 686-87; *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-16 (1984).

The arbitration restrictions in Colorado's HCAA unquestionably violate the FAA. Indeed, by dictating specific language requirements, as well as imposing font, typeface, and positioning requirements, the HCAA is even more restrictive than the Montana law that this Court in *Doctor's Associates* held was preempted by the FAA. Nevertheless, a growing number of state and federal courts have now construed the McCarran-Ferguson Act to permit states to enforce anti-arbitration laws forbidden by the FAA, so long as those restrictions are aimed at agreements involving insurers.

The decision below starkly illustrates the conflicts and confusion that characterize the lower courts' efforts to reconcile the FAA with section 2(b) of the McCarran-Ferguson Act. The Colorado Supreme Court upheld the HCAA's restrictions by refusing even to consider the guidance that application of the *Pireno* factors would have provided. Instead, the court derived a new test that considers whether state laws "directly regulate contracts between health insurance policyholders and their insurers" and "further the interests of these policyholders." Pet. App. 15a-16a. This new test bears no discernable relationship to the plain language of section 2(b). Its adoption exacerbates the conflicts and confusion that already exist in the lower courts over the proper approach to construing section 2(b). And the breadth of the holding below alone warrants review, for as the dissenting Justices below aptly observed, the majority's approach "sweeps with a broad and wide arc that could swallow federal preemption under the Supremacy Clause." *Id.* at 28a.

Review is warranted in particular first to resolve the conflict over the extent to which section 2(b) applies to

statutes that are not specifically directed at insurers but are aimed at some other group, such as (in this case) "health care providers." See Colo. Rev. Stat. § 13-64-403(1), (12). As the dissenting Justices recognized, there is no meaningful difference between the HCAA and restrictive arbitration statutes of general applicability that other courts have not saved from FAA preemption under the McCarran-Ferguson Act. Pet. App. 27a; *American Bankers Ins. Co. of Fla.* v. *Crawford*, 757 So. 2d 1125, 1136 (Ala. 1999); *Hart* v. *Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir. 1971); *Hamilton Life Ins. Co. of N.Y.* v. *Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (2d Cir. 1969). Statutes of general applicability share with the HCAA the characteristics of both applying to insurers and not being specifically directed toward them. It is arbitrary for section 2(b) to preserve the HCAA and not these other statutes, and the Court should resolve that conflict.

Review is also warranted to resolve the acknowledged conflict in the lower courts over the role that the *Pireno* factors should play in cases arising under the first clause of section 2(b). Among federal courts, for example, panels in the Third, Seventh, and Eighth Circuits, like the court below, have expressly refused to consider the *Pireno* factors in cases under the first clause. By contrast, the Fifth, Ninth, Tenth, and Eleventh Circuits continue to be guided by them.

Furthermore, those courts that have considered the *Pireno* factors in FAA cases under the first clause are divided as to how to apply them to arbitration. A number of courts have concluded that statutes restricting arbitration satisfy each of the *Pireno* factors. *E.g.*, *Standard Sec. Life Ins. Co. of N.Y.* v. *West*, 267 F.3d 821, 823-24 (8th Cir. 2001) (per curiam); *Mutual Reinsurance Bureau* v. *Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933 (10th Cir. 1992); *Continental Ins. Co.* v. *Equity Residential Props. Trust*, 565 S.E.2d 603, 605 (Ga. Ct. App. 2002); *Cox* v. *Woodmen of the World Ins. Co.*, 556 S.E.2d 397, 400-02 (S.C. Ct. App. 2001). The California courts, while agreeing that arbitration restrictions address an

"integral" aspect of the insurer-insured relationship nevertheless acknowledge that these restrictions do not spread risk. *E.g. Smith* v. *PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal. App. 4th 139, 161 (2002), *cert. denied*, 537 U.S. 818 (2002); *Imbler* v. *PacifiCare of Cal., Inc.*, 103 Cal. App. 4th 567, 576 (2002).

In contrast, however, the Alabama Supreme Court, applying *Pireno*, has concluded that arbitration restrictions do not constitute the business of insurance. See *Crawford*, 757 So. 2d at 1133. The Alabama Supreme Court has determined, in particular, that arbitration restrictions have no substantial effect upon risk-spreading, and are no more integral to the insurer-insured relationship, or to the performance of an agreement, than are other contractual terms, such as the choice of law or the rules of contract interpretation, that are material to any contract dispute. They thus have no particular nexus to the distinctive attributes of the business of insurance. *Id.* Had the court below followed the *Pireno* analysis of the Alabama Supreme Court, it would have held the HCAA preempted by the FAA.

The confusion over the proper standard in cases under the first clause of section 2(b) reflects, in significant measure, uncertainty over *Pireno* created by this Court's decision in *Fabe*, and compounded by last Term's decision in *Kentucky Association*. In *Fabe*, this Court both distinguished the *Pireno* factors as involving the second clause of section 2(b), and yet employed them at length to evaluate the Ohio insurance insolvency statute. *Kentucky Association* announced a "clean break" from the *Pireno* factors in cases involving ERISA's savings clause, and identified problems with applying the *Pireno* factors to "state law" rather than to "*conduct*." 123 S.Ct. at 1478-79. Because the first clause of section 2(b) also refers to state laws, the majority below construed *Kentucky Association* as license to ignore the *Pireno* factors in the cases under the first clause of section 2(b) of the McCarran-Ferguson Act as well.

In *Kentucky Association*, however, this Court filled the gap created by the abandonment of *Pireno* with two significant requirements: to be a law that "'regulates insurance'" a law must be "specifically directed" toward insurers and must "substantially affect the risk pooling arrangement between the insurer and the insured." *Id.* at 1479.

Here, by contrast, the Colorado Supreme Court jettisoned *Pireno* while adopting a test that lacks any meaningful nexus to those aspects of the business of insurance that distinguish it from other businesses. It set forth a new test so broad that, as the dissent noted, it would cover any state law that affected insurance premiums. Pet. App. 28a. It therefore saved from preemption a state law that would not meet either of the two requirements adopted in *Kentucky Association*, or the three factors in *Pireno*. If the lower courts may properly ignore all consideration of the *Pireno* factors in cases involving the first clause of section 2(b), they should do so only at the direction of this Court, and only with sufficient guidance to ensure that they do not apply standards that effectively "swallow federal preemption." *Id.*

This case is a particularly good vehicle for the Court to use in resolving the conflicts over the use of *Pireno* and the applicability of section 2(b) to state arbitration restrictions. The decision below adopts a standard that not only permits the states to single out the insurance industry as an "FAA-free" zone, but saves statutes not even specifically directed at insurers. It thus gives free reign in a major industry sector to the very judicial and legislative hostility to arbitration that motivated the passage of the FAA. The lower court's grant of effectively unlimited power to the states to restrict the use of arbitration by insurers warrants review by this Court, especially because the standard governing section 2(b) of the McCarran-Ferguson Act is so unsettled.

REVIEW IS WARRANTED TO SETTLE THE TEST FOR DETERMINING WHEN A STATE LAW IS ENACTED "FOR THE PURPOSE OF REGULATING THE BUSINESS OF INSURANCE."

This Court should grant the petition to settle the proper test for determining when a state law is enacted "for the purpose of regulating the business of insurance" under the first clause of section 2(b) of the McCarran-Ferguson Act. The confusion in the lower courts over how to apply the terms of section 2(b) to state laws is rampant. The majority's analysis below illustrates, and exacerbates, that confusion in three significant respects.

1. First, the decision below conflicts with cases that refuse to save from FAA preemption those state laws that restrict the use of arbitration in insurance agreements but are not specifically directed at insurers. Pet. App. 26a-27a; see *Crawford*, 757 So. 2d at 1133; *Hart*, 453 F.2d at 1360; *Hamilton*, 408 F.2d at 611. In each of these cases, the state statutes at issue were statutes of general applicability that restricted the use of arbitration in insurance contracts. None of the state statutes at issue had specifically directed its restrictions at the insurance industry, and so the Alabama Supreme Court, and the Second and Tenth Circuits, each refused to apply the McCarran-Ferguson Act to "reverse preempt" the FAA. *Crawford*, 757 So. 2d at 1133; *Hart*, 453 F.2d at 1360; *Hamilton*, 408 F.2d at 611.

The majority below attempted to distinguish these cases on the ground that the HCAA is not a generally applicable statute, but one that targets "medical services contracts." Pet. App. 12a. That is not a meaningful distinction. Like statutes of general applicability, a statute that targets "medical services contracts" applies to, but is not specifically directed at, insurers. Such a statute therefore should not be deemed to have been enacted for the purpose of regulating insurers. The decisions in *Crawford*, *Hart* and *Hamilton* each stand for the

proposition that even a direct and foreseeable impact of a state law on the terms of an insurance policy is not enough to bring that state statute within the scope of section 2(b) of the McCarran-Ferguson Act. As the dissent recognized, *id.* at 27a-28a, those cases should have controlled the decision here.

The Colorado Supreme Court's decision is also inconsistent with the "common-sense" approach that this Court has adopted in the context of determining whether a law "'regulates insurance'" under ERISA's savings clause. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 740 (1985); *Kentucky Ass'n*, 123 S. Ct. at 1475-76; *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 365-66 (2002); *UNUM Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358, 367 (1999). In ERISA cases, the Court has explained that a law that regulates insurance "'must not just have an impact on the insurance industry, but must be specifically directed toward that industry.'" *Rush Prudential HMO*, 536 U.S. at 365-66; see *Kentucky Ass'n*, 123 S.Ct. at 1476. Using that approach, the Court has held that ERISA saves state insurance statutes that are specifically directed at HMOs in their capacity as the functional equivalent of insurers. *Rush Prudential HMO*, 536 U.S. at 367-73.

The converse applies here. As the trial court recognized, when a state statute is specifically directed not at HMOs as insurers, but at all health care *providers*, common sense compels the conclusion that the state law was not enacted for the purpose of regulating insurers. Indeed, because section 2(b) of the McCarran-Ferguson Act (unlike ERISA) expressly focuses on the "purpose" of the state statute, it is all the more important for any test that purports to implement section 2(b) to incorporate some common-sense assessment of whether the statute was specifically directed at insurers. Yet the Colorado Supreme Court's newly minted test entirely fails to do this. For this reason alone, the Court should grant review.

2. Second, and equally important, the decision below underscores the urgent need for this Court to resolve the

conflicts and confusion in the lower courts over whether and how to apply the *Pireno* factors in cases involving the first clause of section 2(b).

Like the majority below, panels in the Third, Seventh, and Eighth Circuits have concluded that *Pireno* applies only to antitrust cases under the second clause of section 2(b), and is inapplicable to cases under the first clause. In so holding, these cases point to this Court's acknowledgment in *Fabe*, 508 U.S. at 504, that the *Pireno* factors arose in a case construing whether "conduct" constituted the "'business of insurance'" under the second clause of section 2(b). See, *e.g.*, *Highmark, Inc.* v. *UPMC Health Plan, Inc.*, 276 F.3d 160, 167 n.1 (3d Cir. 2001) (stating that *Fabe*'s distinction between the first and second clauses of section 2(b) "makes it difficult, if not impossible, to apply *Pireno*" to determine whether the first clause of section 2(b) prevented the Lanham Act from preempting a state law prohibiting deceptive and false insurance claims); *Autry* v. *Northwest Premium Servs., Inc.*, 144 F.3d 1037, 1041-42 (7th Cir. 1998) (declining to apply *Pireno* to determine whether an Illinois statute governing premium finance agreements was saved from preemption by TILA under the McCarran-Ferguson Act); *Doe* v. *Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1305 n.8 (8th Cir. 1997) (declining to apply *Pireno* to determine whether RICO preempted a state insurance statute, because the *Pireno* factors are "relevant only in cases involving a conflict between state law and federal antitrust law").

Many other courts, however, have concluded that the *Pireno* factors should be considered in cases arising under the first clause. These cases typically point to the extended analysis of the *Pireno* factors that supports the holding in *Fabe*, and to the use of the phrase "the business of insurance" in both clauses of section 2(b). See, *e.g.*, *Munich Am. Reinsurance Co.* v. *Crawford*, 141 F.3d 585, 592 (5th Cir. 1998) (applying *Pireno* to determine that a state insurance insolvency statute regulates the business of insurance, and

was saved from preemption under section 2(b)); *Owensboro Nat'l Bank* v. *Stephens*, 44 F.3d 388, 391-92 (6th Cir. 1994) (holding that the *Pireno* factors are relevant in non-antitrust McCarran-Ferguson Act cases because *Fabe* "did not give 'business of insurance' one meaning in the first clause and a different meaning in the second"); *Merchants Home Delivery Serv., Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486, 1490 & n.2 (9th Cir. 1995) (expressly holding that the *Pireno* factors are applicable in first clause McCarran-Ferguson Act cases after *Fabe*); *Blackfeet Nat'l Bank* v. *Nelson*, 171 F.3d 1237, 1246 n.13 (11th Cir. 1999) (holding that the *Pireno* factors are appropriately applied to determine whether conduct constitutes the business of insurance under the first clause of McCarran-Ferguson); *Sabo* v. *Metropolitan Life Ins. Co.*, 137 F.3d 185, 191 (3d Cir. 1998) (applying *Pireno* factors, and noting that while *Pireno* "was directed to the antitrust clause in section 1012(b), it may nevertheless provide guidance in a more generalized analysis under this Act").

The confusion over the applicability of the *Pireno* factors is well-recognized in the lower courts. The Seventh Circuit has "confess[ed] some uncertainty as to whether *Fabe* counsels us to employ the *Pireno* test in cases involving the first clause of § 2(b)," and has noted that "[m]any other courts have struggled with the same question." *Autry*, 144 F.3d at 1044 n.5.[2] Panels in the Third and Seventh Circuits have recently

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[2] *See also Sabo*, 137 F.3d at 191 n.3 ("Some courts have concluded that this three part [*Pireno*] test is simply not relevant in determining what constitutes the business of insurance in a non-antitrust context. We disagree." (citation omitted)); *Imbler*, 103 Cal. App. 4th at 576 ("[I]t is unclear whether the *Pireno* three-prong test applies in [the non-antitrust] context."); *Ambrose* v. *Blue Cross & Blue Shield of Va., Inc.*, 891 F. Supp. 1153, 1160 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996) (table); *cf.* Peter B. Steffen, *After* Fabe: *Applying the* Pireno *Definition of "Business of Insurance" In First-Clause McCarran-Ferguson Act Cases*, 2000 U. Chi. Legal F. 447, 463 (noting that after *Fabe*, lower courts have struggled to determine "whether they should completely disregard the *Pireno* test in first-clause cases.").

decided not to follow prior panel decisions applying the *Pireno* factors, while a recent Eighth Circuit panel applied *Pireno* even though an earlier panel held that *Pireno* applied only to cases under section 2(b)'s second clause.[3] The confusion also has manifested itself, in some instances, as a dispute over whether courts should apply a "three-factor" or a "four-factor" test. As a practical matter, the real issue in these first-clause cases is whether the *Pireno* factors guide the court's evaluation of state law.[4]

The confusion and conflicts further extend to the issue of how *Pireno* should apply to arbitration statutes. Applying *Pireno*, several courts have concluded that arbitration statutes targeting the insurance industry regulate the business of insurance. See, *e.g.*, *West*, 267 F.3d at 823-24; *Great Plains*, 969 F.2d at 933-34; *Smith*, 93 Cal. App. 4th at 161; *Continental Ins. Co.*, 565 S.E.2d at 605; *Cox*, 556 S.E.2d at 400-02. In contrast, the Alabama Supreme Court's decision in *Crawford* demonstrates that faithful application of the *Pireno* factors to state statutes restricting arbitration compels the conclusion that such restrictions do not regulate the

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[3] *See Autry*, 144 F.3d at 1042 n.3 (declining to follow *American Deposit Corp.* v. *Schacht*, 84 F.3d 834 (7th Cir. 1996), which had held application of *Pireno* is "not . . . inappropriate" (*see* 84 F.3d at 840) in cases under the first clause); *Highmark*, 276 F.3d at 167 n.1 (effectively failing to follow *Sabo*, 137 F.3d at 191, by refusing to apply *Pireno* in a first clause case); *West*, 267 F.3d at 823-24 (applying *Pireno* notwithstanding prior panel decision, in *Norwest Bank*, 107 F.3d at 1305 n.8, holding that *Pireno* factors are relevant only in second clause cases).

[4] *Compare, e.g.*, *Autry*, 144 F.3d at 1040-42 (endorsing a "three part" test and refusing to apply *Pireno*), *and Norwest Bank*, 107 F.3d at 1305 & n.8 (adopting a three-factor test and declining to apply *Pireno* in light of *Fabe*), *with, e.g.*, *Sabo*, 137 F.3d at 189 & n.2 (utilizing a four-factor test, in which the first factor requires the court to apply the *Pireno* factors to determine whether the activity being regulated constitutes the "business of insurance"), *and Merchants Home Delivery Serv.*, 50 F.3d at 1489-90 (adopting a "four factor" test and applying the *Pireno* factors).

business of insurance. At a minimum, this decisional conflict with *Crawford* warrants this Court's review.

In *Crawford*, the Alabama Supreme Court evaluated Alabama's general arbitration statute, which was incorporated by reference into the state's insurance code. 757 So. 2d at 1130-36. The court found that none of the *Pireno* factors was met. *Id.* at 1133. First, the court explained, "the general anti-arbitration statute does not have the effect of 'transferring or spreading a policyholder's risk.'" *Id.* Second, the statute was "no more integral to the insurer-insured relationship than any State's general contract law is integral to a contract made in that State," because it had "no bearing on the more essential aspects of the insurer-insured relationship" such as "the scope of insurance coverage, the term of the policy, [or] the price of the coverage." *Id.* (internal quotation marks omitted). Third, the statute was not limited to entities within the insurance industry. *Id.*

Only the court's analysis of the third factor (whether the statute was "limited" to insurers) was affected by the status of Alabama's statute as one of general applicability. The other two *Pireno* issues – whether arbitration restrictions affect risk-spreading, and whether they are integral to the relationship between insurer and insured – are the same for any statute that regulates arbitration.

There is considerable force to the Alabama Supreme Court's analysis. A state statute that regulates the ability of an insurer and a policyholder to settle disputes by arbitration does not spread risk in any way. It does affect the cost of dispute resolution. It is thus akin, as the dissenting Justices recognized below, to many laws that "could have an effect on insurance premiums." Pet. App. 28a. But, as this Court established in *Group Life & Health Ins. Co.* v. *Royal Drug, Co.*, although "arrangements" that affect an insurer's "costs" and "profits" may affect a policyholder's premiums, "they are not the 'business of insurance.'" 440 U.S. 205, 214-15 (1979); see *id.* at 214 n.12 (explaining further that "there is an

important distinction between risk underwriting and risk reduction"). Notably, in cases enforcing California's arbitration limitations against health plans, the parties and courts have accepted that arbitration restrictions do not spread risk. *Smith*, 93 Cal. App. 4th at 161; *Imbler*, 103 Cal. App. 4th at 576.[5]

Statutes restricting arbitration also are not "integral" to the relationship of insurers and policyholders. An arbitration clause does not affect the performance of an insurance agreement; it affects only the forum in which a dispute is heard, and the procedures that are employed to resolve it. Although issues of forum and procedure are important to policyholders, they are no more significant than choice-of-law issues, basic contract law issues, or other issues that are common to all contractual disputes involving any domain of commercial activity. These considerations further confirm that there is an insufficient nexus between state statutes restricting arbitration and the business of insurance to permit states to defy the strong federal policy in favor of arbitration.

3. There is a final reason why the decision below merits review. The decision below confirms that the Court's recent decision in *Kentucky Association* compounds the uncertainty created by *Fabe* over the applicability of the *Pireno* factors to cases arising under the first clause of section 2(b). Like other lower courts that have rejected *Pireno*, the Colorado Supreme Court emphasized the distinction drawn in *Fabe* between the

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[5] That California courts nevertheless enforce California's health-plan specific arbitration statute illustrates that the lower courts are also confused about the weight to give individual *Pireno* factors. *See, e.g.*, *Royal Drug*, 40 U.S. at 212-13 (risk spreading is the "critical" distinguishing attribute of insurance); *Merchants Home Delivery Serv.*, 50 F.3d at 1490-91 (the "'primary characteristic of the business of insurance is the transferring or spreading of risk,'" and absent an impact on risk-spreading, "the other two [*Pireno*] factors [must] weigh strongly" the other way for the law "to fall within the business of insurance") (citation omitted).

"*first clause*" and "*second clause*" of section 2(b). Pet. App. 14a n.8 (emphasis in original). But the Colorado Supreme Court also relied (see *id.*) upon *Kentucky Association*, where this Court held that considering the *Pireno* factors was no longer appropriate in cases involving ERISA's savings clause, in part because those factors were developed to evaluate "*conduct*" rather than "state law[s]" as ERISA requires. 123 S.Ct. at 1478 (emphasis in original). The Colorado Supreme Court evidently found this significant because the first clause of section 2(b), like ERISA's savings clause, requires evaluation of a state law. Pet. App. 14 n.8.

The rationale for the "clean break" that this Court made with the *Pireno* factors in *Kentucky Association* has compounded the confusion that *Fabe* engendered over what role, if any, those factors ought to play in cases involving the first clause of section 2(b). This Court should now resolve that confusion. A decision to abandon the *Pireno* factors altogether in such cases should be made, if at all, only by this Court, which uniquely is able to provide the guidance that lower courts need to apply section 2(b).

In *Kentucky Association* itself, for example, this Court did simply abandon the *Pireno* factors; it simultaneously adopted "two requirements" that state laws "must" meet to be saved under ERISA: such laws must be "specifically directed toward entities engaged in insurance," and must "substantially affect the risk pooling arrangement between the insurer and the insured." 123 S.Ct. at 1479. As a result, the lower courts now have a clear rule to apply in cases involving ERISA's savings clause.

Equally clear guidance is needed in cases involving section 2(b) of the McCarran-Ferguson Act. Although the differences in the standards the lower courts apply "may seem somewhat semantic, the effect is far from inconsequential." *Autry*, 144 F.3d at 1041. The differing standards lead to differing results for state laws that ought to be treated consistently under the first clause of section 2(b). By

shunning the *Pireno* factors in favor of a sweeping new test that covers not only a state tort reform measure directed at arbitration between patients and providers, but any state law that a court believes will benefit policyholders, the Colorado Supreme Court's decision severs the application of section 2(b) from its plain meaning. This Court should heed the dissent's objections below to the breadth of the majority's new test, grant plenary review, and settle the application of the McCarran-Ferguson Act to state laws that restrict the use of arbitration by insurers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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